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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 150.

W. A. SHIELDS,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR THE PETITIONER.

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The question presented by this case as stated in the Petition for Certiorari was:

> "Are railroads relieved of the obligation imposed by 45 U. S. C., Section 11, to keep a designated appliance 'secure' by reason of the fact that the Interstate Commerce Commission has not adopted a regulation standardizing and making uniform such an appliance?"

Respondent and the ICC answer this in the affirmative. They argue (1) the particular appliance which caused petitioner's injury is not a running board so as to be within

the requirements of the Safety Appliance Act because it has not been standardized by the ICC, and (2) even if the appliance is a running board it is not a safety appliance because it has not been standardized by the ICC. Respondent makes the further argument that, since petitioner is not an employee of a railroad, he cannot invoke the protection of the Act.

Respondent and the ICC argue that compliance with the provisions of the Safety Appliance Act is measured solely by compliance with ICC orders. As pointed out in petitioner's prior brief, this leaves no field of operation for Section 11 of the Act, which sets a congressional standard for appliances, i. e., "secure" or "efficient." ICC regulations have no such requirement. They merely standardize. The ICC and respondent would have this court hold that, by granting the ICC authority to make appliances uniform, Congress by implication has vested in the ICC complete authority to decide by its regulations which appliances are safety appliances.

The Appliance Causing Petitioner's Injury Was a Running Board.

The Safety Appliance Act requires that running boards be secure; therefore, respondent commences its brief with a condemnation of what it labels petitioner's "persistent assumption" that the appliance in question is a running board. Respondent was just as persistent in referring to it as a running board until petitioner amended his complaint to allege respondent's violation of the Safety Appliance Act. Respondent's repair order on the defective board designates it "dome running board" (Pl. Ex. 7, R. 184, 185). In answer to interrogatories, respondent refers to it as a running board seven times (R. 24-30). Even at the trial, witnesses for respondent and respondent's counsel lapsed into references to the board as a "running board" (R. 242, 259, 260). Having abandoned "running

board" for dome step board only after being confronted with a violation of the running board provisions of the Safety Appliance Act, respondent is critical of petitioner for not joining in its inconsistency. Despite the record respondent wishes to argue that there is no basis for the Trial Court's treating this appliance as a running board. But respondent's brief makes clear that its only basis for such argument is the omission of the appliance by the ICC in its standardization order.

Respondent and the ICC argue that the board in question is not a running board because if it had been the ICC would have standardized it. (See brief of ICC at page 13.) But, at page 11 of its brief, the ICC acknowledges that it has not standardized the ladder on the tank car extending between the bottom running board and the dome of the car. The ICC forbears arguing that this "ladder" is any less a ladder for its omission to standardize it. Indeed, the ICC concedes that it is a ladder. It fails to explain, however, why its omission to standardize a running board is persuasive that the appliance is not a running board while its omission to standardize a ladder has no such effect.

Actually, the ICC has stated its present understanding of why it did not standardize this appliance. It has nothing to do with any determination that the appliance was not a running board. The ICC states that only appliances which it deems directly connected with the movement of trains are standardized. Petitioner acknowledges that in determining whether an appliance is a safety appliance a court should give weight to the views of the ICC; but in determining whether a particular appliance is a running board, ladder or grab iron no significance whatever should be attached to the omission of such an appliance from the standardization orders of the ICC when the admitted basis of the omission is an administrative determination that the appliance is a loading and unloading device as opposed to a device directly used in the operation of a train.

The ICC reads that portion of Section 11 of the Act providing that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards" as meaning "all cars requiring secure ladders and secure running boards which are used in and about the movement and operation of cars shall be equipped with such ladders and running boards."

The ICC reasons that the sole Congressional purpose in the Safety Appliance Act is the protection of trainmen from defective equipment used in the movement of cars. Petitioner submits the ICC is in error both in its factual assumption that this appliance is used merely as a loading device and in its narrow construction of the intention of Congress as expressed in the Act.

The record clearly shows that the defective board was of a kind customarily used by railroad men in the operation and movement of trains.[1] Just as petitioner in loading tank cars used this board as well as standardized appliances, so do employees engaged in the movement of trains. Yet the ICC would deny the humane protection of the Act to employees as well as to petitioner from any equipment not standardized by ICC regulation.

In seeking to give a narrow construction to the intent of Congress in enacting the Act, the ICC argues that the primary concern of Congress in enacting the statute was

[1] Record, 178, 179:

Q. In your experience on the railroad, Mr. Kelley, have you ever seen an employee of a railroad standing on, or using that board at the top there that you have said you have heard many times called a running board?

A. Yes, sir.

Q. For what purpose do the employees of the railroad use that running board?

A. I have seen train crews use it to get up there where they can be in view and pass hand signals, and I have seen dome covers work loose on tank cars en route and they would have to get up and use this board to stand on while they made temporary repairs or adjustments on them.

to reduce the mounting toll of injuries and deaths to trainmen on moving trains. Petitioner agrees, of course, that when the statute was enacted Congressional attention was focused primarily upon accidents to trainmen in the interstate movement of trains. But this Court has refused repeatedly to limit the broad protection of the Act to this acknowledged major purpose. In **Fairport, P. & E. R. Co. v. Meredith**, 292 U. S. 589, in holding that a motorist injured at a grade crossing could invoke the air brake provisions of the Act, this Court stated:

> "It may fairly be said the nature of the duties imposed by a statute and the benefits resulting from its performance usually determine what persons are entitled to its protection."

To argue, as does the ICC, that an employee is protected by the Safety Appliance Act as he moves from car to car over the bottom running boards of a tank car, but he is unprotected when standing on a top running board to pass signals or check seals, is to draw a line for Congress which Congress would not draw for itself. Injuries from defective top running boards are just as disabling as injuries from bottom running boards. Congress has declared that both be secure and, by Section 12, those standardized by the ICC be uniform. "Nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage" injuries from an insecure ladder or insecure running board merely because the primary function of the ladder or running board was for loading or unloading the car. See the approach to a similar problem and the quoted language of this Court in **Urie v. Thompson**, 337 U. S. 163, 69 S. Ct. 1018, 1030, where this Court was considering the scope of the Federal Employers' Liability Act. Congress anticipated that the nature of appliances could and would change and therefore granted the ICC the power and authority to amend its standardization orders, 45 U. S. C. Sec. 12. The fact that the ICC has

not exercised its power to standardize this appliance should not be allowed to take from those who are using this running board the statutory assurance that it be secure.

At page 13 of its brief, the ICC states that if it had deemed the appliance in suit a running board it would have standardized it. Petitioner has already shown that this is incorrect by pointing out the omission of the ICC to standardize the ladder on this car. The argument is unsound for a second reason. There are good reasons for allowing railroads to experiment further with improved tank car design. Petitioner suggests no compelling reasons why the ICC even at this date should regulate the width or thickness of a top running board on a tank car. Apparently it is practical to design a tank car with different unloading devices and with no top running board at all (R. 182). This does not indicate that cars requiring such running boards need not have them secure.

The ICC recognized long ago that defective appliances not included in the Act are not always repaired even when attention is called to them.[2] The record shows that the running board in question is now being treated as a safety appliance by railroads (R. 178). The obvious result of declaring it other than a safety appliance will be to increase the hazard to railroad men and others who must use it.

Petitioner agrees with respondent and the ICC that it was a question of law for the Trial Court to decide whether the device in question was a running board and a safety appliance. As demonstrated hereinbefore, the record fully supports the Trial Court's decision. Neither respondent nor the ICC suggests any evidence in the record to substantiate a contrary holding. And, as has been demonstrated, no significance can be attached to their argument that this

[2] 21st Annual Report of the Interstate Commerce Commission, 1907. See ICC Brief, p. 6.

is not a running board because not included in a standardization order. But even if the ICC is correct and "considerable weight" should be given its presently announced position, the Trial Court was correct in its decision that the board in question was a running board and a safety appliance. On the one hand, the Trial Court had before it the testimony of witnesses that the board was a running board, and the command of Section 11 of the Act that running boards be secure. It also had before it respondent's answers to interrogatories and respondent's repair order referring to the device as a running board and the testimony of experienced railroad men that this was treated by car inspectors and railroads as a safety appliance (R. 178). On the other hand, the Trial Court had before it the regulations of the ICC which are silent. On this record the Trial Court properly ruled that the appliance was a safety appliance and submitted the question of its compliance with the Act to the jury.

Petitioner was injured while preparing to unload this tank car because of a defective but nonstandardized running board. It could just as easily have been a flagman passing signals from the top of the tank car, or a conductor checking the seal on the car. All work on and about this running board in their daily tasks. Each needs protection from maintenance of the running board in a defective condition. Congress, having imposed "an absolute and imperative duty of making them secure," has sought to give to each this protection. **Illinois Central v. Williams**, 242 U. S. 462. Any action on the part of the ICC in standardizing the board should not be allowed to take it away.

The Running Board Causing Petitioner's Injury Is One Within the Protection of the Safety Appliance Act.

Respondent and the ICC take the position in their briefs that, even if the defective appliance is a running board, it

is not within the protection of the Safety Appliance Act since it is not one which has been standardized by the ICC. They argue that when Congress declared "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards" it meant "all cars required by the ICC to have secure ladders and running boards shall be equipped with such ladders and running boards." Once again respondent and the ICC seek to read into Section 11 of the Act language Congress did not use. If, as is argued, Congress meant, "required by the ICC," it would have been a simple matter to have so stated.

The proper construction of the word "requiring" is made clear when considered in the context of the other provisions of Section 11.

> "All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars requiring ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders . . ."

The obvious intention of the Section is that every car—box, tank, flat, gondola, etc.—shall conform to the sill step and hand brake requirements. Not all cars need ladders and running boards for their proper use. There is no place on a flat car or a gondola for a ladder or running board (ICC brief, footnote 10, page 12). Congress, not wishing to demand useless expense to car manufacturers, used the terms "all cars requiring" when setting the standard of safety for ladders and running boards. The correct construction of the quoted clause is that a particular railroad car "requiring" a ladder or running board for its proper or efficient use must have such ladder or running board secure; not that only such ladders and running boards as are "required" by the ICC must be secure.

The principle of **Ill. Central v. Williams**, 242 U. S. 462, makes clear that the ICC regulations are for the purpose of uniformity rather than enumeration of which appliances shall conform to the Congressionally fixed standards of "secure" or "efficient." Congress declared which appliances are to be safety appliances. The ICC has been delegated only the power to standardize those appliances. **Williams** does not reference ICC regulations in determining whether the ladder in question was one requiring a secure grab iron at the top. Indeed, the question in **Williams** was whether the Act applied before the effective date of the regulations. **Williams** holds that if a car requires a ladder for its proper use the handhold at the top of the ladder must be secure.

As this Court stated in the **Williams** case at page . . . :

> "The congressional purpose in enacting Sec. 2 of the Act is very plain. At the time the Act was passed railroad carriers had in service many box cars, **requiring for their proper use** secure ladders and secure handholds or grab irons on their roofs at the tops of such ladders, and **the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair into a statutory, an absolute and imperative, duty, of making them 'secure,'** . . ." (Emphasis added.)

The Court which wrote the **Williams** opinion would be somewhat surprised to hear the argument of respondent and the ICC, being made nearly forty years after the **Williams** case, that as to cars "requiring for their proper use" ladders and running boards railroads are not under a "statutory, an absolute and imperative, duty, of making them secure" unless such appliances have been standardized by the ICC.

As already pointed out in this brief, there may be sound, practical reasons for not standardizing or freezing all tank car design, but none of these reasons affords a logical basis for contending that the running board placed on cars "requiring for their proper use" such boards need not have them "secure."

In **Lilly v. Grand Trunk Western R. Co.**, 317 U. S. 481, this Court was considering an alleged violation of the Boiler Inspection Act. The violation of the Act was shown to have been ice on the locomotive's tender which violated the provisions of the Act prohibiting maintenance of a condition involving "unnecessary peril to life or limb." No order of the ICC was considered by the trial court or jury which found for the plaintiff. This Court stated:

> "The use of a tender upon whose top an employee must go in the course of his duties, which is covered with ice, seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated."

The Court goes on to demonstrate that there was an ICC regulation requiring tenders to be clean upon which it could rest its decision. But the opinion clearly implies that the jury was entitled to find the Act violated on the facts presented without any ICC regulation on the subject.

As the Boiler Inspection Act in **Lilly v. Grand Trunk** could be violated without violation of any ICC regulation, so can the Safety Appliance Act by the maintenance of an insecure ladder or running board, even though there is no ICC order standardizing the defective appliance.

Respondent in its brief (p. 6) asserts that petitioner's construction of the Safety Appliance Act places it in an anomalous position because it cannot refuse to accept from other carriers cars equipped as required by the ICC. But, as pointed out in petitioner's brief on the merits, there

is no requirement in the ICC regulations that a running board be secure. Respondent's argument when carried to its logical conclusion is that it would be perfectly free to haul cars with insecure running boards without violating the Safety Appliance Act. This argument overlooks completely that the injury and death Congress sought to stop was caused just as much, if not more, from defective appliances as from non-uniform appliances.

Petitioner Is Not Barred From a Recovery Under the Safety Appliance Act Because He Is Not a Railroad Employee.

Respondent argues that the Safety Appliance Act was enacted for the purpose and effect of facilitating employee recovery and was not intended to extend to persons other than railroad employees. Once again respondent seeks to interpret the Congressional intent in narrow limits which this Court has consistently refused to do.

In **Fairport, P. & E. R. Co. v. Meredith**, 292 U. S. 589, the railroad was attacking in this Court a judgment in favor of a motorist injured at a grade crossing as a result of the railroad's violation of the air brake provisions of the Safety Appliance Act. The ground of attack was the same presented by respondent in this case, i. e., that the protection of the Act does not extend beyond employees and passengers on the railroad. Refusing to adopt such a narrow construction of the Act, this Court stated:

> "To confine the beneficial effect of these provisions to employees and passengers would be to impute to Congress an intention to ignore the equally important element which their enactment actually contributes to the safety of travelers at highway crossings. Since all of these three classes of persons are within the mischief at which the provisions are aimed, it is quite reasonable to interpret the statute imposing the duty as including all of them."

While obviously **Meredith** does not interpret the extent of the coverage of the Act beyond the fact situation before the Court in that case, if the Act extends to one in an automobile injured at a grade crossing surely it includes a workingman using the appliance on the railroad car for the very purpose for which it was primarily designed.

The Supreme Court of Missouri, in **Rush v. Thompson**, 356 Mo. 568, 202 S. W. 2d 568 (1947), relied on **Meredith** in holding that an employee of the consignee of coal was within the Act's protection. The principle of the **Rush** case is clearly applicable here.

In its brief respondent cites **Patton v. B. & O. R. Co.**, 197 F. 2d 732 (C. A. 3, 1952); **Risberg v. Duluth, M. & I. R. Co.**, 233 Minn. 396, 47 N. W. 2d 113, and **Paul v. D. M. & I. R. Co.**, 96 F. Supp. 578 (D. C. Minn., 1950), in support of its argument that the Safety Appliance Act cannot be invoked by non-railroad employees. Petitioner has no quarrel with the holdings or the principles of these cases.

In each of these cases the plaintiff was an employee of a company operating a private railroad to whom the defendant railroad had delivered cars. In each case the plaintiff was injured while these cars were being used on the lines of his employer. The language of the Act is that no carrier shall "haul, or permit to be hauled or used on **its** line, any car . . ." (Emphasis supplied.) In the three cases cited by respondent, the defective cars not being in use on the defendants' lines, the defendant was relieved of liability. The fact that the plaintiffs were non-railroad employees was not significant. Here it is undisputed that the defective car was in use on respondent's line at the time of the injury and hence the three cases cited by respondent have no application.

Respondent also cites **Brady v. Terminal Railroad Association**, 303 U. S. 10, 58 S. Ct. 426. In **Brady** the plaintiff was a car inspector. He was on the defendant's lines to

inspect cars being delivered to his employer and while he was inspecting cars he was injured. Among other things this Court points out: "The fact that petitioner was not an employee of the Terminal Association did not necessarily absolve it from duty to him." The **Brady** case holds that an employee of one railroad can recover against another railroad for a violation of the Safety Appliance Act. This Court in **Brady** refused to limit the Act's protection to employees of the particular defendant railroad. Its opinion cannot logically be construed as deciding that only railroad employees can recover for violations of the Act.

This Court has carefully refrained from any narrow interpretation of the Safety Appliance Act which would increase the probability of injury to those earning their livelihood working in and around trains.

> "And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance and operation of congressionally prohibited appliances." **Coray v. Southern Pacific,** 335 U. S. 520.

Petitioner is one of the class who must go on tank cars in order to earn his livelihood. As much as any employee he needs and deserves protection from defective appliances commanded by Congress to be safe.

Respectfully submitted,

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